CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

THIRD SECTION

CASE OF BUCK v. GERMANY

(Application no. 41604/98)

JUDGMENT

STRASBOURG

28 April 2005

FINAL

28/07/2005

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention.

In the case of Buck v. Germany,

The European Court of Human Rights (Third Section), sitting as a Chamber composed of:

Mr B. ZUPANČIČ, *President*,
Mr J. HEDIGAN,
Mr L. CAFLISCH,
Mr C. BÎRSAN,
Mrs M. TSATSA-NIKOLOVSKA,
Mrs A. GYULUMYAN,
Mrs R. JAEGER, *judges*,
and Mr V. BERGER, *Section Registrar*,

Having deliberated in private on 7 May 2002 and 24 March 2005,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in an application (no. 41604/98) against the Federal Republic of Germany lodged with the European Commission of Human Rights ("the Commission") under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a German national, Mr Jürgen Buck ("the applicant"), on 23 March 1998. Having been designated before the Commission by the initials J.B., the applicant subsequently agreed to the disclosure of his name.

2. The applicant was represented by Mr M. Buck, a lawyer practising in Leipzig. The German Government ("the Government") were represented by their Agent, Mr K. Stoltenberg, *Ministerialdirigent*.

3. The applicant alleged that the search of his business and residential premises had violated Article 8 of the Convention, and that the absence of adequate reasons on the search order amounted to a breach of Article 6 § 1 of the Convention.

4. The application was transmitted to the Court on 1 November 1998, when Protocol No. 11 to the Convention came into force (Article 5 § 2 of Protocol No. 11).

5. The application was allocated to the Fourth Section of the Court (Rule 52 § 1 of the Rules of Court). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1.

6. On 1 November 2001 the Court changed the composition of its Sections (Rule 25 § 1). This case was assigned to the newly composed Third Section (Rule 52 § 1).

7. By a decision of 7 May 2002, the Chamber declared the application admissible.

8. The applicant and the Government each filed observations on the merits (Rule 59 § 1). The parties replied in writing to each other's observations.

9. On 1 November 2004 the Court changed the composition of its Sections (Rule 25 § 1). This case was assigned to the newly composed Third Section (Rule 52 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

10. The applicant was born in 1938 and lives in Dettingen.

A. The initial phase of the proceedings concerning the speeding offence

11. In August 1996 the Dettingen municipal authorities imposed a fine of 120 German marks (DEM), plus costs amounting to DEM 36, on V.B., the applicant's son, for having exceeded the speed limit of 50 km/h by 28 km/h on the evening of 21 May 1996, when travelling in a car belonging to the Trinkomat private limited company (Regulations 3 § 3 (1) and 49 § 1 (3) of the Road Traffic Regulations and section 24 of the Road Traffic Act – see "Relevant domestic law" below). The applicant is the owner and manager of that company.

12. On 4 September 1996 V.B. lodged an objection against the administrative decision imposing the fine.

13. On 12 March 1997 the trial in the case opened before the Bad Urach District Court. V.B. pleaded not guilty, stating that about fifteen other persons could have been driving the company car in question on that day. The applicant, summoned as a witness, refused to give evidence, as he was entitled to do as a family member. The hearing was adjourned to 19 March 1997.

B. The proceedings regarding the warrant of 13 March 1997

14. On 13 March 1997 around 10 a.m. the applicant, on being asked by a policeman to give evidence about his employees in connection with the proceedings against his son, stated again that he did not wish to do so and that none of his employees was currently working on the business premises.

On the same day a police officer, on the order of the Bad Urach District Court judge, asked the city of Dettingen to provide a passport photograph of the applicant's son. Police enquiries from the Dettingen trade authorities (*Gewerbeamt*) about the applicant's employees at the relevant time had led to nothing.

15. On 13 March 1997, at an unknown time, the Bad Urach District Court, in the context of the above proceedings against V.B., issued a warrant to search the business and residential premises of the applicant. The warrant read as follows:

> "In the context of the preliminary investigations against
>
> ... [V.B.] ...
>
> concerning
>
> the contravention of a traffic regulation,
>
> pursuant to Article 33 § 4 of the Code of Criminal Procedure without a prior hearing, in accordance with Articles 94, 95, 98, 99, 100, 102, 103, 105, 106 § 1, 111 et seq., and 162 of the Code of Criminal Procedure and section 46 of the Contraventions of Regulations Act,
>
> 1. the search of the business and residential premises of the father, Jürgen Buck, ..., 3 ... Street, Dettingen/Erms, Trinkomat company;
>
> 2. the seizure of documents that reveal the identity of the employees of Trinkomat in ... Dettingen between 20 May and 22 May 1996
>
> are ordered.
>
> Reasons:
>
> The son of the manager of Trinkomat, who is charged with having committed, on 21 May 1996, a contravention of Regulation 3 of the Road Traffic Regulations with a company car, has stated at the trial hearing on 12 March 1997 that a driver employed by the company could have committed the offence.
>
> ..."

16. The search of the residential and business premises in Dettingen, a town of some 10,000 inhabitants, was effected the same day around 2 p.m. by four police officers from the local police station. Several documents, such as personnel files and statements on working hours, were seized; copies were made and the originals were given back to the applicant the next day. The documents disclosed the names of at least six persons, four women and two men, who had been employed by the applicant's company at the relevant time and revealed, furthermore, that another relative of the applicant could have been driving the company car at the time of the speeding offence. The applicant objected to the search and, assisted by

counsel, appealed against the search and seizure decision on 13 March 1997, the very day on which the warrant had been issued.

17. On 21 March 1997 the Tübingen Regional Court, in a decision addressed to V.B., dismissed the appeal of 13 March 1997. It considered that the appeal against the search warrant was inadmissible as it was devoid of purpose (*prozessual überholt*), the search having been effected in the meantime. The relevance of the few documents seized could be established without the need for a further procedure. The appeal against the seizure order was ill-founded, as the documents seized were relevant for the assessment of the evidence because they could show whether, as asserted by the appellant, one of the company's employees had committed the traffic offence in question. Moreover, the seizure had not been disproportionate because copies of the originals had been filed and the originals handed back.

18. On 21 May 1997 the Tübingen Regional Court, upon a complaint by the applicant's representative, re-examined the applicant's appeal, declaring it inadmissible as far as the search warrant was concerned and unfounded as to the seizure order. In these respects the court repeated its earlier reasoning. The Regional Court added that its earlier decision of 21 March 1997 had become devoid of purpose and, for the sake of clarity, quashed it.

19. On 30 June 1997 the applicant lodged a constitutional complaint with the Federal Constitutional Court. He submitted in particular that the District Court, at the hearing of 12 March 1997, had been unable to establish whether the person on the radar photo was V.B. He further stated that the documents seized showed that none of the six other persons who had been working for the applicant's company at the relevant time could have been the person shown on the radar photo.

20. On 13 September 1997 a panel of three judges of the Federal Constitutional Court refused to admit the complaint. The Constitutional Court disagreed with the Regional Court's finding that the appeal against the search warrant was inadmissible for the sole reason that the search had already been carried out. According to the Constitutional Court, that finding disregarded the principle of effective legal protection as guaranteed by Article 19 § 4 of the Basic Law. In support of its view, the Constitutional Court referred to its decision of 30 April 1997, which had reversed its former case-law on the point. Nonetheless, the Constitutional Court considered it inappropriate to admit the constitutional complaint. Indeed, when examining the lawfulness of the seizure order, the Regional Court had also, incidentally, addressed the question of the lawfulness of the search order. In any event, the impugned search warrant was obviously lawful. This decision was served on 24 September 1997.

C. The resumed criminal proceedings against the applicant's son

21. On 19 March 1997, in the resumed trial proceedings, the Bad Urach District Court rendered its judgment against V.B. It found him guilty of having negligently exceeded a speed limit, imposed a fine of DEM 120 (approximately 61 euros) on him in accordance with the uniform scale of fines (*Bußgeldkatalog*) for the various road-traffic regulatory offences, and ordered him to bear the costs of the proceedings.

22. As regards V.B.'s personal background, the District Court noted that V.B. had had his driving licence since 1991, that he drove between 40,000 and 50,000 km per year and that there was no record of previous traffic offences.

23. The District Court, having regard to expert technical evidence, found that the radar check had been properly carried out and that the measurements were correct. Moreover, having compared the photographs taken on the occasion of the radar check, in particular the enlargement prepared by the expert, and V.B.'s passport photograph taken in 1994, which had been retained in the administrative files of the Dettingen municipal authorities, the court reached the conclusion that it was V.B. who had been driving the car. In this respect, the court compared the form of the face, the nose, the position of the eyes and the eyebrows. Furthermore, although V.B. had meanwhile grown a beard, the lower part of the face on the radar photos and of V.B.'s face on the passport photo, showing him without a beard, clearly matched. There were no indications that any other person with the same characteristics had been driving the car at the relevant time.

24. On 19 August 1997 the Stuttgart Court of Appeal dismissed V.B.'s request for leave to appeal.

II. RELEVANT DOMESTIC LAW

25. The search complained of was ordered in the context of proceedings concerning an offence against the Road Traffic Act (*Straßenverkehrsgesetz*). Regulation 3 of the Road Traffic Regulations (*Straßenverkehrsordnung*) concerns speed limits. Subsection 3(1), sets a speed limit of 50 km/h in towns. Under Regulation 49 § 1 (3), it is a regulatory or petty offence (*Ordnungswidrigkeit*) to contravene Regulation 3; under section 24 of the Road Traffic Act such an offence is punishable by a fine.

26. The subject of regulatory or petty offences is governed by the Contraventions of Regulations Act (*Ordnungswidrigkeitengesetz*). Such offences are considered to be of minor importance and have, therefore, been removed from the category of criminal offences under German law. They are partly governed by special rules other than the rules applicable to

criminal offences (see, in this connection, *Öztürk v. Germany*, judgment of 21 February 1984, Series A no. 73, pp. 10 et seq., §§ 17 et seq., and pp. 17-18, § 49). Under section 46(1) of the Contraventions of Regulations Act, the provisions of the ordinary law governing criminal procedure – in particular the Code of Criminal Procedure – are applicable by analogy to the procedure in respect of contraventions of regulations, subject to the exceptions laid down in the said Act.

27. Article 103 of the Code of Criminal Procedure (*Straf-prozessordnung*) provides that the home and other premises (*Wohnung und andere Räume*) of a person who is not suspected of a criminal offence may be searched only in order to apprehend a person charged with an offence, to investigate the evidence of an offence or to seize specific objects, provided always that there are facts to suggest that such person, evidence or object are to be found on the premises to be searched. Under Article 105 of the Code of Criminal Procedure, searches may only be ordered by a judge or, in case of urgency (*Gefahr im Verzug*), by the public prosecutor's office and its officials. If a search is carried out in residential or business premises without the judge or public prosecutor being present, a municipal officer or two inhabitants of the municipality in which the search is made shall be requested to attend.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

28. The applicant complained that the search of his business and residential premises and the seizure of documents, which had been ordered by the Bad Urach District Court, had been in breach of his right to respect for his home. He argued in particular that, in the context of investigations into a contravention of a regulation committed by a third person, the search was disproportionate. He relied on Article 8 of the Convention, the relevant parts of which provide:

> "1. Everyone has the right to respect for his private ... life, his home ...
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

29. The Government contested that submission.

A. Whether there was an interference

30. The applicant claimed that the search of his business and residential premises and the seizure of several documents had interfered with his right to respect for his home as guaranteed by Article 8 § 1. In this respect, the Government agreed with the applicant's submissions.

31. The Court would point out that, as it has repeatedly held, the notion of "home" in Article 8 § 1 does not only encompass a private individual's home. It reiterates that the word "*domicile*" in the French version of Article 8 has a broader connotation than the word "home" and may extend, for example, to a professional person's office. Consequently, "home" is to be construed as including also the registered office of a company run by a private individual and a juristic person's registered office, branches and other business premises (see, *inter alia*, *Chappell v. the United Kingdom*, judgment of 30 March 1989, Series A no. 152-A, pp. 12-13, § 26, and pp. 21-22, § 51; *Niemietz v. Germany*, judgment of 16 December 1992, Series A no. 251-B, pp. 33-34, §§ 29-31; and *Société Colas Est and Others v. France*, no. 37971/97, §§ 40-41, ECHR 2002-III).

32. In the present case, the search and seizure ordered by the Bad Urach District Court concerned the applicant's residential premises and the business premises of the limited liability company owned and managed by him. The Court, having regard to its above findings, concludes that in respect of both premises, there has been an interference with the applicant's right to respect for his home.

33. Consequently, the Court finds it unnecessary to determine whether, as it has found in several comparable cases (see, *inter alia*, *Chappell*, cited above, pp. 21-22, § 51; *Niemietz*, loc. cit.; and *Funke v. France*, judgment of 25 February 1993, Series A no. 256-A, p. 22, § 48), there has also been an interference with the applicant's right to respect for his private life as guaranteed by Article 8 § 1.

B. Whether the interference was justified

34. It accordingly has to be determined whether the interference was justified under paragraph 2 of Article 8, in other words whether it was "in accordance with the law", pursued one or more of the legitimate aims set out in that paragraph and was "necessary in a democratic society" to achieve the aim or aims in question.

1. "In accordance with the law"

35. The applicant maintained that the search warrant was not in accordance with domestic law, as it was not sufficiently reasoned and was disproportionate, and that this had not been examined on the merits by the Tübingen Regional Court.

36. The Government submitted that the search and seizure had been ordered by a judge on the basis of Article 103 § 1 of the Code of Criminal Procedure, read in conjunction with section 46(1) of the Contraventions of Regulations Act.

37. The Court reiterates that an interference cannot be regarded as "in accordance with the law" unless it has, in particular, some basis in domestic law. In a sphere covered by written law, the "law" is the enactment in force as the competent courts have interpreted it (see, *inter alia*, *Société Colas Est and Others*, cited above, § 43). In this connection, the Court reiterates that its power to review compliance with domestic law is limited, it being in the first place for the national authorities, notably the courts, to interpret and apply that law (see, *inter alia*, *Chappell*, cited above, p. 23, § 54).

38. In the instant case, the Court notes that the District Court judge was empowered, under Article 103 § 1 of the Code of Criminal Procedure taken together with section 46(1) of the Contraventions of Regulations Act, section 24 of the Road Traffic Act and Regulations 3 and 49 of the Road Traffic Regulations, to order a search of and a seizure on the premises of a person other than the one accused of a regulatory traffic offence. It observes that both the Tübingen Regional Court – in so far as it can be considered to have examined the search order on the merits – and the Federal Constitutional Court considered the search and seizure order to be lawful in terms of the said domestic law. The Court sees no reason to arrive at a different conclusion. Consequently, the interference was "in accordance with the law".

2. Legitimate aim

39. The applicant maintained that the search and seizure order did not pursue a legitimate aim because it had been rushed through, that is, only one day after the first hearing in the proceedings against the applicant's son, and the documents seized had been irrelevant to the assessment of evidence in the judgment against the applicant's son. He suggested that the true reason for the District Court judge issuing the search and seizure order had been his dissatisfaction with the applicant's refusal to give evidence against his son as a witness in the first hearing.

40. According to the Government, the search served the legitimate aims of the protection of public order, the prevention of disorder or crime and, as far as the provisions on speeding were concerned, the protection of the rights and freedoms of others, namely, other road users.

41. The Court notes that the Bad Urach District Court, in its – admittedly succinct – reasoning in respect of the search and seizure order, pointed out that these measures were aimed at disclosing the identity of the person liable for the speeding offence in question. Any purported further motives for the order remain a matter about which the Court does not wish to speculate. It finds that the order issued with a view to finding and seizing

documents that would reveal the identity of the company's employees at the relevant time pursued aims that were consistent with the Convention, namely the prevention of disorder or crime and the protection of the rights of others, notably the rights of other road users to protection of life and limb.

3. "Necessary in a democratic society"

42. The applicant argued that the search of his residential and business premises, which had to be regarded as a last resort, had not been necessary to obtain the names of potential drivers. In particular, it had been disproportionate to order the search of his flat, which was clearly separate from the business premises. He should first have been asked to name the employees to be taken into consideration and to present the relevant material voluntarily. In his view, the search was disproportionate in view of the loss of his good reputation and the reduction in sales. According to him, this was particularly true considering the petty nature of the contravention in question, purportedly committed by a first offender, and the fact that the District Court, in its decision, made no use of the results of the search and seizure. From the evidence thereby obtained, it emerged that a large number of employees could have been driving the company car at the relevant time; however, none of them had been questioned or compared with the photograph taken on the occasion of the radar check. The applicant further contended that the Regional Court had failed to examine the lawfulness of the search and in particular to consider his position as a person other than the suspect. In this respect, he disagreed with the argument advanced by the Federal Constitutional Court that the Regional Court, when dismissing the complaint about the search warrant for procedural reasons, had in substance reviewed its lawfulness.

43. The Government submitted that the search and seizure provided the only possibility for the District Court to establish who had been driving the car at the relevant time. Only by comparing the photographs, and on the basis of the documents seized, was the District Court in a position to exclude the possibility that a person other than the applicant's son had been driving the car. The applicant's employees could be excluded as potential drivers at the relevant time due to their sex or age. It did not appear appropriate to discontinue the proceedings in such circumstances, considering general prevention purposes and the risks to life and limb for other road users inherent in speeding. Finally, the seizure order, which explicitly referred to documents concerning the company's staff at the relevant time, limited the search order to the least serious interference with the applicant's rights. The effectiveness of the investigation would have been impeded if the search order had been restricted to the applicant's business premises, which were located at the same address as his residential premises. The applicant could not be regarded as an uninvolved third

person, as he was the father of the person charged and had to be regarded *de facto* as the owner of the company car.

44. Under the Court's settled case-law, the notion of "necessity" implies that the interference corresponds to a pressing social need and, in particular, that it is proportionate to the legitimate aim pursued (see, among many other authorities, *Camenzind v. Switzerland*, judgment of 16 December 1997, *Reports of Judgments and Decisions* 1997-VIII, p. 2893, § 44). In determining whether an interference is "necessary in a democratic society", the Court will take into account that a certain margin of appreciation is left to the Contracting States. However, the exceptions provided for in paragraph 2 of Article 8 are to be interpreted narrowly, and the need for them in a given case must be convincingly established (see, *inter alia*, *Funke*, cited above, p. 24, § 55).

45. As regards, in particular, searches of premises and seizures, the Court has consistently held that the Contracting States may consider it necessary to resort to such measures in order to obtain physical evidence of certain offences. The Court will assess whether the reasons adduced to justify such measures were relevant and sufficient and whether the aforementioned proportionality principle has been adhered to (see *Funke*, cited above, pp. 24-25, §§ 55-57; *Crémieux v. France*, judgment of 25 February 1993, Series A no. 256-B, pp. 62-63, §§ 38-40; and *Miailhe v. France*, judgment of 25 February 1993**,** Series A no. 256-C, pp. 89-90, §§ 36-38). As regards the latter point, the Court must first ensure that the relevant legislation and practice afford individuals adequate and effective safeguards against abuse. Secondly, the Court must consider the specific circumstances of each case in order to determine whether, in the particular case, the interference in question was proportionate to the aim pursued (see, in particular, *Camenzind*, cited above, pp. 2893-94, § 45). The criteria the Court has taken into consideration in determining this latter issue have been, *inter alia*, the severity of the offence in connection with which the search and seizure were effected, the manner and circumstances in which the order was issued, in particular further evidence available at that time, the content and scope of the order, having particular regard to the nature of the premises searched and the safeguards taken in order to confine the impact of the measure to reasonable bounds, and the extent of possible repercussions on the reputation of the person affected by the search (see, *mutatis mutandis*, *Chappell*, cited above, p. 25, § 60; *Niemietz*, cited above, pp. 35-36, § 37; *Funke*, cited above, p. 25, § 57; and *Camenzind*, cited above, pp. 2894-95, § 46).

46. With regard to the safeguards against abuse provided by German legislation and practice in the case of searches and seizures like the one in the present case, the Court notes that such measures may, except in exigent circumstances, only be ordered by a judge under the limited conditions set out in the Code of Criminal Procedure. Furthermore, following the

Constitutional Court's change of jurisprudence in April 1997, the person concerned may challenge the legality of a search order also in cases in which the order has already been executed. However, the Court observes that in the instant case the Regional Court initially ignored the fact that the applicant, and not his son V.B., had lodged the complaint against the search and seizure order and rendered a decision concerning V.B. It subsequently served a decision on the applicant with an identical reasoning, notwithstanding that the applicant himself had not been charged with a contravention of a regulation, and rejected his complaint against the search warrant as inadmissible because devoid of purpose (*prozessual überholt*), the search having been effected in the meantime. According to the Federal Constitutional Court, it was not decisive that the Regional Court had rejected the applicant's complaint as inadmissible contrary to its new jurisprudence as of April 1997, as the reasoning concerning the seizure order was to cover also the search order, which it regarded as obviously lawful. In these circumstances, the Court finds that there have been some procedural shortcomings in the present case. Nonetheless, the safeguards provided by German legislation and jurisprudence against abuse in the sphere of searches and seizures in general can be considered adequate and effective.

47. As to the proportionality of the search and seizure order to the legitimate aim pursued in the particular circumstances of the case, the Court, having regard to the relevant criteria established in its case-law, observes in the first place that the offence in respect of which the search and seizure had been ordered concerned a mere contravention of a road traffic rule. The contravention of such a regulation constitutes a petty offence which is of minor importance and has, therefore, been removed from the category of criminal offences under German law (see paragraph 26 above). In addition to that, in the instant case all that was at stake was the conviction of a person who had no previous record of contraventions of road traffic rules.

48. Furthermore, the Court notes that, even though the contravention in question had been committed with a car belonging to the company owned by the applicant, the proceedings in the course of which the search and seizure had been executed had not been directed against the applicant himself, but against his son, that is, a third party.

49. With regard to the manner and circumstances in which the order had been issued, the Court observes that the search and seizure were ordered to investigate the applicant's son's affirmation that other persons, employees of the applicant's company, could have been driving the car, that is, to verify the defence of the applicant's son. The competent judge had ordered the police to question the applicant about his company's employees at the relevant time before the search and seizure warrant was executed on the same day. Contrary to his submissions, the applicant had, therefore, been

given an opportunity to present the relevant information voluntarily and thus to avoid the search. However, the Court also notes that the judge of the Bad Urach District Court, before issuing the order, had also asked the municipal authorities of Dettingen to provide a passport photograph of the applicant's son. It appears that the District Court, in its judgment given only six days after the search and seizure had been ordered and executed, merely relied on this photographical evidence, whereas there is no clear indication that the material seized had been taken into account when assessing the evidence. Consequently, the search and seizure of documents on the applicant's business and residential premises had, in any event, not been the only means of establishing who was liable for the speeding offence.

50. Considering the content and scope of the search and seizure order, the Court finds that the decision was drafted in broad terms. Whereas it is satisfied that the scope of the search order could be determined by having regard to the seizure order, which specified the material to look for on the premises, it notes that the latter order did not give any reasons why documents concerning business matters should be found on the applicant's private premises. Thus, the scope of the order was not limited to what was indispensable in the circumstances of the case.

51. Finally, having regard to possible repercussions on the reputation of the person affected, the Court observes that the attendant publicity of the search of the applicant's business and residential premises in a town of some 10,000 inhabitants was likely to have an adverse effect on his personal reputation and that of the company owned and managed by him. In this connection, it is to be recalled that the applicant himself was not suspected of any contravention or crime.

52. The Court would like to stress that, as it has stated above, the States, when taking measures to prevent disorder or crime and to protect the rights of others, may well consider it necessary, for the purposes of special and general prevention, to resort to measures such as searches and seizures in order to obtain evidence of certain offences in a sphere in which it is otherwise impossible to identify the person guilty of the offence. However, having regard to the severity of the interference with the right to respect for his home of a person affected by such measures, it must be clearly established that the proportionality principle has been adhered to. Having regard to the special circumstances of this case, in particular the fact that the search and seizure in question had been ordered in connection with a minor contravention of a regulation purportedly committed by a third person and comprised the private residential premises of the applicant, the Court concludes that the interference cannot be regarded as proportionate to the legitimate aims pursued.

53. Consequently, there has been a violation of Article 8 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

54. The applicant further complained that the District Court's warrant ordering the search and seizure had not been properly reasoned. He relied on Article 6 § 1 of the Convention, which provides:

> "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. ..."

55. The applicant submitted that the District Court had failed to explain why a search of the residential and business premises of a third party was necessary. In particular, no justification had been given for the search of residential premises in order to seize company records. Moreover, the search ordered under item 1 of the warrant lacked an indication as to the type and contents of legal evidence; in his view, the reasons stated in the decision applied only to the seizure ordered under item 2 of the decision.

56. The Government submitted that the complaint was unsubstantiated, as the District Court had reasoned that no other means of evidence was available, the applicant and his son having availed themselves of their respective rights to refuse to give evidence. It had not been necessary to specify why a search of the applicant's residential premises had also been ordered, as they were located at the same address as the business premises. Furthermore, it had been sufficient to specify the premises to be searched in the search order alone, as it had been clear from the seizure order issued in connection with the search order which items of evidence were to be looked for.

57. Having already taken into consideration, in the context of Article 8, the content and scope of the search and seizure order, including the reasons given for the order (see paragraph 50 above), the Court finds that no separate issue arises under Article 6 § 1 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

58. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

59. The applicant claimed compensation for pecuniary and non-pecuniary damage, and the reimbursement of his costs and expenses.

A. Damage

60. The applicant, who submitted some documentary evidence in support of his claim, sought a total of 1,852.01 euros (EUR) for pecuniary damage, claiming that the search and seizure carried out on his premises on 13 March 1997 had brought his catering business to a standstill on that day. Having regard to the yearly turnover of his business, divided by 240 working days per year, he argued that he had lost this sum on the day of the search. The applicant also sought compensation of EUR 40,000 for non-pecuniary damage. He referred to his feelings of helplessness and the loss of his own and his company's reputation caused by the search of his premises in a town of some 10,000 inhabitants who did not believe that such a measure had been ordered merely in connection with the contravention of a traffic rule.

61. The Government maintained that the applicant's claim for pecuniary damage was unsubstantiated, as the search and seizure had taken place on a Saturday at 2 p.m., when it was probable that no one had been working on the premises. As to the non-pecuniary damage allegedly resulting from a loss of reputation, the Government pointed out that the turnover of the applicant's company in 1997 had in fact been higher than in 1996.

62. As regards the applicant's claim in respect of pecuniary damage, the Court notes that there is insufficient proof of any causal connection between the search and seizure in breach of the applicant's right to respect for his home and the pecuniary damage allegedly sustained by him. Therefore, the Court makes no award under this head.

63. As to compensation for non-pecuniary damage, the Court, having regard to all the elements before it, considers that the finding of a violation of Article 8 constitutes in itself sufficient just satisfaction in respect of any non-pecuniary damage suffered by the applicant.

B. Costs and expenses

64. The applicant, who submitted documentary evidence in support of his claim, sought a total of EUR 44,522.61 for costs and expenses. This sum comprised EUR 14,115.75 for lawyers' fees and expenses in the proceedings before the national courts, as well as EUR 29,892.16 for lawyers' fees and expenses and EUR 514.70 for translation costs in the proceedings before this Court. He pointed out that he had agreed to pay his lawyer 350 German marks per hour, plus the value-added tax (VAT) payable.

65. The Government, having regard to the files of the proceedings in their possession, maintained that a considerable amount of the costs and expenses for lawyers' fees claimed had in fact been incurred in the proceedings against V.B., and not in the proceedings brought by the

applicant. Basing its calculation on the standard fees payable according to the Regulation on Lawyers' Fees (*Bundesrechtsanwaltsgebührenordnung* – BRAGO), only a total of EUR 2,649.37 had been incurred for lawyers' fees in the domestic proceedings and the proceedings before this Court.

66. According to the Court's consistent case-law, to be awarded costs and expenses the injured party must have incurred them in order to seek prevention or rectification of a violation of the Convention, to have the same established by the Court and to obtain redress therefor. It must also be shown that the costs were actually and necessarily incurred and that they are reasonable as to quantum (see, *inter alia*, *Venema v. the Netherlands*, no. 35731/97, § 117, ECHR 2002-X).

67. The Court is satisfied that the legal expenses incurred by the applicant in the domestic proceedings before the Tübingen Regional Court and before the Federal Constitutional Court can be considered as having been paid in an attempt to redress the violation of Article 8. The same applies with respect to the legal expenses and translation costs incurred in the proceedings before this Court. However, the Court agrees with the Government that the costs for the services of counsel in the proceedings as a whole appear excessive. Having regard to its case-law and making its own assessment, the Court awards the applicant EUR 2,000, plus any VAT that may be chargeable.

C. Default interest

68. The Court considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT

1. *Holds* by four votes to three that there has been a violation of Article 8 of the Convention;

2. *Holds* unanimously that no separate issue arises under Article 6 of the Convention;

3. *Holds* unanimously that the finding of a violation constitutes in itself sufficient just satisfaction for the non-pecuniary damage sustained by the applicant;

4. *Holds* unanimously

(a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 2,000 (two thousand euros) in respect of costs and expenses, plus any tax that may be chargeable;
(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

5. *Dismisses* unanimously the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 28 April 2005, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Vincent BERGER
Registrar

Boštjan ZUPANČIČ
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the joint partly dissenting opinion of Mr Hedigan, Mr Bîrsan and Mrs Jaeger is annexed to this judgment.

B.Z.
V.B.

JOINT PARTLY DISSENTING OPINION OF JUDGES HEDIGAN, BÎRSAN AND JAEGER

We regret that we cannot agree with the majority in their finding of a violation of Article 8.

We note that the burden of proof in respect of the offences charged remained at all times on the prosecution. We accept that V.B., the son of the applicant, had the benefit of a right against self-incrimination. We note that he indicated that any one of about fifteen other persons employed by the company could have been driving the car that day. The applicant, V.B.'s father, who was the employer of those fifteen persons, refused to give evidence, as he was entitled to do as a family member. He further refused on the day of the search to give information about his employees.

As a consequence, two ways were then left open to the authorities to prove the identity of the driver. The first of these was to ascertain the identity of those fifteen other persons. This was pursued by way of the search, seizure and copying of personnel records. The second was to have an expert compare the photos taken on the occasion of the radar check with the passport photograph taken of V.B. in 1994. In his constitutional complaint to the Federal Constitutional Court, the applicant stated that at the first hearing the District Court could not establish the identity of V.B from the radar photograph as the driver of the car. He further stated that in the examination of his personnel records all the other employees were excluded by either age or sex. The expert photo comparison was eventually done and in fact satisfied the District Court that V.B. had been driving the car at the relevant time. It is clear, however, that the photographic evidence might not have been conclusive particularly as V.B. had changed his appearance somewhat between the two photos and expert evidence was required.

It seems to us that, notwithstanding the petty nature of the offence, it was reasonable and proportionate for the authorities to embark simultaneously upon both these ways of proving the case against V.B. We cannot overlook the fact that the District Court could not have known at the first hearing on 12 March 1997 whether expert evidence regarding the photo would be sufficient to satisfy the burden of proving the identity of the accused. In any event the personnel records did play a part in proving identity by excluding all other possible drivers.

We also note that the search of the applicant's private premises as well as the office was reasonable and proportionate bearing in mind the nature and size of the applicant's business. This may well have been very difficult for both the authorities and the applicant but was, we believe, the inevitable consequence of the manner in which the applicant's son and the applicant chose to defend the case. On the day of the search, the applicant had had the opportunity of avoiding the embarrassment of the search of his premises but

chose not to take it. In our view he should not complain of the action he forced upon the authorities.

We are therefore of the view that there has not been a violation of Article 8.

We are in full agreement with the majority in refusing to award any damages to the applicant.